

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THOMAS FLOOD,

Defendant-Appellant.

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UNPUBLISHED

December 21, 2004

No. 248157

Wayne Circuit Court

LC No. 02-014683-01

Before: Markey, P.J., and Fitzgerald and Owens, JJ.

PER CURIAM.

Defendant appeals by right his convictions of assault with intent to do great bodily harm less than murder, MCL 750.84, and larceny in a building, MCL 750.360, entered after a jury trial. We affirm.

Defendant was charged with assault with intent to commit murder, MCL 750.83, and larceny in a building as a result of an incident at his place of employment. Complainant, defendant's employer, testified that she terminated defendant's employment and argued with him regarding his final wages. Complainant testified that defendant hit her in the head with a stapler and his hand, and threw a trash can at her, spilling the contents onto her. Subsequently, complainant discovered that a cell phone was missing from her purse.

Defendant admitted that he dumped the contents of the trash can on complainant, but denied that he threw the can at her. He admitted that he took complainant's cell phone, but contended that he did not intend to deprive her of it permanently. He maintained that he took the phone because he believed he was owed a debt. The jury found defendant guilty of assault with intent to do great bodily harm less than murder as a lesser included offense of assault with intent to commit murder, and larceny in a building.

Defendant argues that trial counsel rendered ineffective assistance by conceding during closing argument that he was guilty of assault by virtue of having dumped the contents of a trash can on complainant's head. We disagree.

To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. Counsel must have made errors so serious that he was not performing as the "counsel"

guaranteed by the federal and state constitutions. US Const, Am VI; Const 1963, art 1, § 20; *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). Counsel's deficient performance must have resulted in prejudice. To demonstrate the existence of prejudice, a defendant must show a reasonable probability that but for counsel's error, the result of the proceedings would have been different. *Id.*

Counsel does not render ineffective assistance by conceding certain points at trial, including conceding guilt of a lesser offense. Only a complete concession of guilt constitutes ineffective assistance. *People v Kryzstopaniec*, 170 Mich App 588, 596; 429 NW2d 828 (1988). Defendant testified that he dumped trash on complainant's head. Counsel admitted that this act constituted an assault, but denied that defendant struck complainant with the trash can or that he intended to harm her. Counsel did not concede that defendant was guilty of a charged offense. Counsel's argument was reasonable trial strategy. We do not substitute our judgment for that of trial counsel on matters of trial strategy. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). Defendant has not demonstrated that counsel's performance resulted in prejudice. *Carbin, supra*.

Defendant argues that the trial court erred by failing to sua sponte instruct the jury on the defense of claim of right, CJI2d 7.5, and that trial counsel rendered ineffective assistance by failing to request the instruction. We disagree.

We review de novo jury instructions in their entirety to determine whether the trial court committed error requiring reversal. *People v Marion*, 250 Mich App 446, 448; 647 NW2d 521 (2002); *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). Instructions do not create error if they fairly presented the issues for trial and sufficiently protected the defendant's rights. *Id.* Error does not result from the omission of an instruction if the charge as a whole covered the substance of the omitted instruction. *Id.*

Waiver constitutes the intentional abandonment of a known right, while forfeiture constitutes the failure to timely assert a right. A party who forfeits a right might still obtain appellate review, but a party who waives a known right cannot seek appellate review of a claimed deprivation of the right. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). A party waives review of the propriety of jury instructions when he approves the instructions at trial. *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002). Defense counsel did not object to the trial court's instructions, and thus has waived the issue on appeal. *Id.*

Trial counsel did not render ineffective assistance by failing to request an instruction on the defense of claim of right. Defendant maintained that he took the cell phone because he was owed a debt, but did not claim that he had a legal right to the cell phone. The evidence did not support the giving of CJI2d 7.5. Trial counsel was not required to make a meritless request for an inapplicable instruction. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

We affirm.

/s/ Jane E. Markey  
/s/ E. Thomas Fitzgerald  
/s/ Donald S. Owens